

The seal of the Government of Yukon features two bison flanking a central shield. The shield is divided into four quadrants: top-left with a crescent moon, top-right with a pickaxe, bottom-left with a bison head, and bottom-right with a shovel. Above the shield is a crown and a banner with the motto "UNITED WE STAND DIVIDED WE FALL". Below the shield is another banner with the motto "EAGLE POPULUS SUPREMACY". The year "MDCCCXX" is at the bottom.

Respondent.

No. 10-1288 BN

We do not find cause exists to discipline the nursing license of Jacqueline Steinert.

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Crow Halcomb represented the Board. The matter became ready for our decision on June 21, 2011, the day the last written argument was due.

Findings of Fact

1. The Board is an agency of the State of Missouri, created and established by Missouri law for the purpose of executing and enforcing Chapter 335,² the Nursing Practice Act.

2. Steinert is licensed by the Board as an RN. Steinert's license is current and active and was at all times relevant to this action.

3. Steinert was employed as an RN in the Intermediate Cardiac Unit at St. John's Hospital in Springfield, Missouri ("the Hospital") in a probationary status from October 13, 2008 until January 13, 2009. Her duties included giving medications to patients as ordered or required and verifying the administration of the medication by scanning the patient's wristband and the medication label prior to administration.

4. To ensure that medications were administered to the correct patients, the Hospital's policy required verification of the administration of the medication by scanning, and required nurses to maintain 95% accuracy in their scanning.

5. Steinert's scanning rate was between 60 and 79%³ during the three months she was employed by the Hospital.

6. Steinert was observed by patients and staff to be tired and drowsy or hyperactive while on duty.

7. Steinert was observed by staff appearing to be asleep during a meeting on one occasion.

² Statutory references, unless otherwise noted, are to the 2012 Supplement to the Revised Statutes of Missouri.

³ The Board's complaint refers to "60-70%," but exhibits show that Steinert's scanning rate was actually as high as 79% for at least one month.

8. On one occasion, Steinert failed to administer a medication to a patient as ordered.
9. On another occasion, Steinert administered a pain medication to a patient without verifying that it was the same pain medication that had been ordered for the patient.
10. Some patients expressed concern with regard to Steinert's behavior.
11. Steinert stated that she was tired and sometimes distracted because she had just returned to work after caring for her husband, who had died a few months earlier after a long illness, and that this was a new area of nursing for her.
12. Steinert also stated that she had trouble scanning because her badge did not work properly and that her supervisors were aware of the problem.
13. Steinert's conduct did not result in harm to any patient.
14. On January 13, 2009, the Hospital terminated Steinert's employment because she "has been unable to follow policy and procedure in the administering of medications causing patient medication errors" and "on 1/9/09 she reported to work in an unfit condition, tired and kept falling asleep during shift report."⁴
15. On January 22, 2009, the Hospital notified the Board that it had discharged Steinert "for unsatisfactory work performance during her probationary period."

Conclusions of Law

We have jurisdiction to hear the complaint.⁵ The Board has the burden of proving that Steinert has committed an act for which the law allows discipline.⁶ The Board argues that there is cause for discipline under § 335.066.2(5):

2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any certificate of registration or authority,

⁴ Exhibit A1 at 2.

⁵ Section 621.045.

⁶ *Missouri Real Estate Comm'n v. Berger*, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989).

permit or license required by sections 335.011 to 335.096 or any person who has failed to renew or has surrendered his or her certificate of registration or authority, permit or license for any one or any combination of the following causes:

(5) Incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of any profession licensed or regulated by sections 335.011 to 335.096[.]

Although the Board argues in its proposed findings of fact and conclusions of law that there is cause for discipline under § 335.066.2(5) and (12), the complaint alleges cause for discipline only under subdivision (5) for gross negligence and incompetence. We can find cause for discipline only on the law cited in the complaint.⁷

This Commission must judge the credibility of witnesses, and we have the discretion to believe all, part, or none of the testimony of any witness.⁸ When there is a direct conflict in the testimony, we must make a choice between the conflicting testimonies.⁹ Because Steinert did not participate in the hearing, we have only her statements in her letter to the Board, which was introduced as an exhibit at the hearing.

I. Subdivision (5) Professional Standards

The Board's complaint alleges that Steinert's conduct constitutes gross negligence and incompetency in the performance of her duties as an RN, but the Board's brief presents arguments only with regard to incompetency, misconduct and violation of professional trust. We will consider the two professional standards set forth in the complaint.

⁷ *Sander v. Missouri Real Estate Comm'n*, 710 S.W.2d 896, 901 (Mo. App., E.D. 1986).

⁸ *Harrington v. Smarr*, 844 S.W.2d 16, 19 (Mo. App., W.D. 1992).

⁹ 844 S.W.2d at 19.

Incompetency is a general lack of professional ability, or a lack of disposition to use an otherwise sufficient professional ability, to perform in an occupation.¹⁰ We follow the analysis of incompetency in a disciplinary case from the Supreme Court, *Albanna v. State Bd. of Reg'n for the Healing Arts*.¹¹ Incompetency is a “state of being” showing that a professional is unable or unwilling to function properly in the profession.¹² Properly administering medications falls under the professional ability of a nurse. However, Steinert’s failure to consistently follow the Hospital’s policy of verifying the administration of medications by scanning the patient’s wristband and the medication’s label does not by itself demonstrate a lack of professional ability. Rather, her conduct may be explained by the fact that she was still a probationary employee and was getting used to Hospital’s policies and procedures. We find that Steinert’s conduct did not constitute incompetency.

Gross negligence is a deviation from professional standards so egregious that it demonstrates a conscious indifference to a professional duty.¹³ The Board provided no expert testimony, and normally expert testimony is required to prove that “the individual engaged in a gross deviation from the standard of care.”¹⁴

We find that the Board failed to prove that Steinert’s conduct demonstrated a conscious indifference to her professional duty or was so egregious as to rise to the level of gross negligence.

¹⁰ *Tendai v. Missouri State Bd. of Reg'n for the Healing Arts*, 161 S.W.3d 358, 369 (Mo. banc 2005).

¹¹ 293 S.W.3d 423 (Mo. banc 2009).

¹² *Id.* at 435.

¹³ *Duncan v. Missouri Bd. for Arch'ts, Prof'l Eng'rs & Land Surv'rs*, 744 S.W.2d 524, 533 (Mo. App., E.D. 1988).

¹⁴ *Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 226 (Mo. App., W.D. 2012). *See also Tendai*, 161 S.W.3d at 367 (“When the standard of care involves matters outside the competence and understanding of ordinary lay witnesses, it must be established by expert witness testimony.”).

Summary

We do not find cause exists to discipline Steinert.

SO ORDERED on July 9, 2013.

\s\ Nimrod T. Chapel, Jr.
NIMROD T. CHAPEL, JR.
Commissioner